Supreme Court, U.S.
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No. 94-1436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JAMES T. WILSON and ELAINE WILSON,
Petitioners,

v.

ALEXANDER'S POWER SHIPPING CO., LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1) Whether this case is suitable for review where the thrust of petitioners' argument is simply that the District Court erred in granting summary judgment when there are issues of material fact to be decided by a jury.

2) Where it is undisputed that oil is commonly found on a ship's deck and an experienced stevedore-supervisor not only anticipates finding oil but is actually inspecting the deck specifically for oil at the time of the accident, whether the District Court committed error in holding, on these specific facts, that the oil on the deck did not constitute a breach of the shipowner's turnover duty of safe condition.

3) Where it is undisputed that oil on a ship's deck is routinely encountered and reasonably to be expected by an expert stevedore and an experienced stevedore-supervisor is actually inspecting the deck for oil at the time of the accident, whether the District Court committed error in holding, on these specific facts, that the shipowner had no duty to warn the stevedore of the oil.

LIST OF PARTIES PURSUANT TO RULE 29.1

Upon information and belief, Respondent Alexander's Power Shipping Co., Ltd. is now defunct. Assurance-foreningen Gard of Arendal, Norway, a protection and indemnity association of shipowners, has an interest in this case as underwriter for Respondent.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner James T. Wilson was a stevedore superintendent, a supervisory employee, not merely a foreman as stated by petitioners in their Statement Of The Case and not an ordinary longshoreman. He has over fifteen years experience as a stevedore. [Wilson affidavit ¶ 1, petitioners' brief, p. 47a]. At the time of the accident petitioner Wilson along with Safety Director Klages and Stevedore Hughes were inspecting the ship's decks and cargo holds. [Klages affidavit ¶ 5, petitioners' brief,

p.42a; Hughes affidavit ¶ 3, petitioners' brief, p.52a; petitioners' brief, p.8]. It was broad daylight. [Def's Statement Of Material Facts #5 (2a) and Plaintiff's Response (6a)].

Petitioners state that Superintendent Wilson did not expect to find oil on the ship's deck during his inspection. However petitioners' admissions in the case show the contrary. Petitioners admit that Stevedore Superintendent Wilson routinely inspects for oil on the weather deck [Def's Statement Of Material Facts #18 (3a) and Plaintiff's Response (8a); petitioners' brief, p.8] and that he was actually inspecting and looking specifically for oil on the weather deck at the time of the accident. [Plaintiffs' Response To Defendant's Statement Of Material Facts ##13 and 19 (7a, 8a); petitioners' brief, p.8; ¶ 3, Plaintiffs' Response To Def.'s Motion For Summary Judgment, petitioner's brief (36a)]. Moreover petitioners admit that oil is commonly found on the weather deck of a cargo ship [Def's Statement Of Material Facts #11 (2a) and Plaintiffs' Response (7a); petitioners' brief, p.7] and that an experienced stevedore must anticipate and watch specifically for oil on the weather deck. [Def's Statement Of Material Facts #19 (3a) and Plaintiff's Response (8a)]. Given these admissions, petitioners can hardly argue that Superintendent Wilson did not expect and anticipate oil on the weather deck of the ship. The District Court was clearly correct in making this logical inference based on petitioners' admissions.

Petitioners state that the oil on which Superintendent Wilson slipped was located "beneath" a bundle of stowed lumber on the deck. [petitioners' brief, pp. 5, 19]. However the sawdust placed over the oil on the deck as shown in the photograph in petitioners' brief (61a) reveals that the oil was next to or in front of the bundle, not beneath it as asserted by petitioners.

Petitioner's response to Respondent's Motion for Summary Judgment presented no evidence to pierce Respond-

ent's contention that it had no knowledge of oil on the deck, so as to create an issue of fact for trial. Petitioners merely asserted by affidavit that there were crewmembers on the weather deck at the time Stevedore Superintendent Wilson and his party boarded the vessel to conduct his inspection and that the ship's crew had recently opened the hatches. [Wilson affidavit, ¶ 2, Petitioners' brief p. 47a]. These facts are insufficient to create an issue that Respondent had actual or constructive knowledge of the oil.

SUMMARY OF ARGUMENT

This case is not certworthy. The issue presented by petitioners is whether the Eleventh Circuit erred in taking the case from the jury by way of affirmance of the District Court's summary judgment when there were genuine factual questions to be decided. This issue is not one recognized by Supreme Court Rule 10 as justifying the grant of a writ of certiorari. In addition, there are no special or important reasons for this court to review the District Court's holding that there are no material factual issues for trial. The principles applied by the District Court have only recently been reaffirmed by this court in *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78 (1994) and the lower court's decision is not in conflict with the prior decisions of this court or any other circuit.

Respondent shipowner did not breach its duty to turn over the vessel to the stevedore in such condition that an expert and experienced stevedore, mindful of the dangers he should expect to encounter in his job, can conduct cargo operations safely. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 416 n.18 (1969); *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78, 87 (1994). The shipowner's duty is only to provide a workplace where an expert stevedore can work safely. There is no duty to provide a ship which is defect-free. If the particular hazard, such

as oil on the weather deck of a cargo ship, is so common that a stevedore anticipates its presence and is in fact actually inspecting the deck specifically for oil at the time of the accident, then logic and experience dictate the conclusion that the stevedore, particularly a superintendent-stevedore with over fifteen years experience as in this case, can safely work around the oil.

Petitioners admit that oil is a common hazard often found on the weather deck and that petitioner stevedore superintendent anticipated finding and was inspecting the deck for oil at the time of the accident. In light of these undisputed facts, which are the material facts relating to the shipowner's turnover duty of safe condition, it follows as a matter of law that the oil did not constitute a breach of the shipowner's duty. The vessel owner should be able to rely on an experienced stevedore superintendent to work around a hazard which he anticipates and for which he is actually inspecting. Here petitioner was looking specifically for the very condition which allegedly caused his accident. Because petitioners cannot make a showing that the shipowner breached its *Burnside—Howlett* turnover duty of safe condition, which is an essential element of their case, the District Court was correct in granting summary judgment.

In this case petitioners have presented no evidence and do not even contend that the shipowner had actual or constructive knowledge of the oil on the deck. There is no evidence as to when the oil spilled onto the deck or how long it had been there prior to the accident. In effect petitioners are asking the court to find liability without fault. This constitutes an unseaworthiness argument. Such basis of liability was abolished by the 1972 Amendments to the Longshore Act, 33 U.S.C. § 905(b).

The District Court's ruling in this case and on these admitted facts that the shipowner had no duty to warn petitioner superintendent-stevedore of the oil on the deck is consistent with *Burnside—Scindia—Howlett* principles.

The shipowner has no duty to warn of a hazard which is routinely encountered and reasonably to be anticipated by an expert and experienced stevedore in conducting his work. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 417 n.18 (1969). Petitioners do not even contend that the presence of oil is not usually encountered or reasonably to be anticipated by an expert stevedore. They can hardly do so in light of their admissions that oil is commonly found on the whether deck of a cargo ship and that Stevedore Superintendent Wilson not only anticipated finding oil but was specifically inspecting the deck for oil at the time of the accident. Given these admisisons, the District Court's holding and the Eleventh Circuit affirmance are consistent with *Burnside*, *Scindia*, and *Howlett*. Moreover, the commonly encountered and anticipated oil hazard in this case was not "latent" within the principles of *Howlett* which defines such a hazard as one not anticipated by a competent stevedore in the ordinary course of cargo operations. 512 U.S. at ——, 129 L.Ed.2d at 88, 92.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT SUITABLE FOR SUPREME COURT REVIEW. PETITIONERS' QUESTION PRESENTED FOR REVIEW IN EFFECT IS SIMPLY WHETHER THE DISTRICT COURT WAS CORRECT IN HOLDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT. THIS ISSUE DOES NOT JUSTIFY A WRIT OF CERTIORARI UNDER SUPREME COURT RULE 10.

This case is not suitable for U.S. Supreme Court review. In effect petitioners are contending that the District Court committed error by granting summary judgment when there are issues of material fact to be decided by a jury. This is evident from petitioners' presentation of their questions for review wherein they state the Eleventh Circuit erred by removing the *Scindia* duties from the jury. Additionally, throughout their brief petitioners emphasize

that the "trier of fact" should have been allowed to decide the case. Whether the District Court was correct in holding there was no genuine factual issue for trial is not an issue recognized by Supreme Court Rule 10 as justifying the granting of a writ of certiorari. Moreover the case does not involve any unsettled principles of federal law or any issues of great public significance. In addition the lower court's decision is not in conflict with the decisions of this court or any circuit court.

II. WHERE IT IS UNDISPUTED THAT OIL IS COMMONLY FOUND ON A SHIP'S DECK AND AN EXPERIENCED STEVEDORE-SUPERVISOR NOT ONLY ANTICIPATES FINDING OIL BUT IS ACTUALLY INSPECTING THE DECK SPECIFICALLY FOR OIL, THE DISTRICT COURT'S HOLDING THAT ON THESE SPECIFIC FACTS THE OIL DID NOT CONSTITUTE A BREACH OF THE SHIPOWNER'S TURNOVER DUTY IS CONSISTENT WITH THIS COURT'S DECISIONS IN THE *BURNSIDE, SCINDIA,* AND *HOWLETT* CASES.

In *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78 (1994), this Court relied on its previous decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969) in defining the shipowner's turnover duty of safe condition as requiring the vessel owner to exercise ordinary care to turn over the ship to the stevedore in such condition that an expert and experienced stevedore "mindful of the dangers he should expect to encounter, arising from the hazards of the ship's service" can conduct cargo operations safely. 512 U.S. at ——, 129 L.Ed.2d at 87, quoting from *Federal Marine Terminals*, 394 U.S. at 416-17 n.18. If an experienced stevedore is mindful of, or anticipates, the particular hazard, then the hazard does not constitute a breach of the shipowner's turnover duty. There is no duty to provide a vessel which is "defect free", *Bilderbeck v. World Wide Shipping Agency*, 776 F.2d 817, 818 (9th Cir. 1985), only a duty to turn over the ship in such condition that

an experienced stevedore mindful of the hazards he should expect to encounter can work safely. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167 (1981).

Petitioner in this case, a stevedore superintendent with over fifteen years experience, admitted in his pleadings that oil on the weather deck of a cargo ship is to be anticipated and that he was actually looking for and inspecting specifically for oil on the deck at the time of the accident. If an experienced stevedore not only anticipates finding oil on the deck but is inspecting the deck specifically for oil at the time of the accident, logic and experience dictate that he can safely work around the oil, whether the oil is open and obvious or difficult to see. Here the stevedore superintendent was looking for and inspecting specifically for the very condition that allegedly caused his accident. In light of these undisputed facts, which are the material facts relating to the shipowner's turnover duty of safe condition, it follows that the oil did not constitute a breach of the shipowner's turnover duty of safe condition. Because of these admissions, petitioners cannot make a showing that the shipowner breached its *Howlett* turnover duty, which is an essential element of their case on which they will bear the burden of proof at trial, and the District Court was correct in granting summary judgment. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Moreover the District Court decision and the Eleventh Circuit affirmance are entirely consistent with the principles of *Federal Marine Terminals* and *Howlett*.

Although the District Court did not specifically address the turnover duty of safe condition, this is of no consequence because the material facts relating to this duty have been admitted by petitioners in their pleadings. Reviewing *de novo*, all the Eleventh Circuit was required to do was to apply the *Howlett* principles to the admitted facts. Based on petitioners' admissions, the shipowner, as a matter of law, satisfied its *Howlett* turnover duty of safe condition and summary judgment was proper.

Contrary to petitioners' assertion, the lower court's decision does not eliminate a stevedore's remedy for obscured oil on a ship's deck or introduce the doctrine of assumption of risk. The District Court held simply that because this particular supervisory stevedore admittedly anticipated and was actually inspecting for the very condition which allegedly caused his accident, the condition did not violate the shipowner's turnover duty. What sets this case apart are petitioners' admissions. The holding sets no general precedent that longshore and harbor workers can under no circumstances recover for oil on a ship's deck. Moreover, the shipowner's satisfaction of its turnover duty is based on the undisputed facts in this particular case that oil would be anticipated by a reasonably competent stevedore and that the stevedore superintendent was inspecting for oil. It is not based on an assumption of risk by the petitioner.

III. WHERE THERE IS NO EVIDENCE AND NO CONTENTION THAT THE SHIPOWNER HAD ACTUAL OR CONSTRUCTIVE PRIOR KNOWLEDGE OF THE PRESENCE OF OIL ON DECK, TO HOLD THE SHIPOWNER RESPONSIBLE WOULD CONSTITUTE LIABILITY WITHOUT FAULT.

Under the principles of the *Burnside*, *Scindia*, and *Howlett* cases, the shipowner's turnover duty of safe condition is one of "ordinary care under the circumstances". *Burnside*, 394 U.S. at 416 n.18 (1969); *Scindia*, 451 U.S. at 167 (1981); *Howlett*, 512 U.S. at ——, 129 L.Ed.2d at 87 (1994). In order to recover for a shipboard hazard, a longshore or harbor worker must show not only that the hazard would have been neither obvious to nor anticipated by a reasonably competent worker, he must also show that the shipowner had actual or constructive prior knowledge of the hazard. *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78, 92 (1994). In this case petitioners have presented no facts showing that respondent shipowner had actual or constructive prior knowledge of the oil on the deck. Nor

do they even contend the shipowner had such knowledge. There is no evidence as to when the oil spilled onto the deck or how long it had been there before the accident. Without evidence on this point, petitioners are asking the court to find liability without fault, which was expressly abolished by the 1972 Amendments to the Longshore Act, 33 U.S.C. § 905(b). In effect, petitioners are making an unseaworthiness argument. However negligence, not unseaworthiness, is the controlling standard. *Howlett*, 512 U.S. at ——, 129 L.Ed.2d at 91 (1994).

In their brief, petitioners contend that the lower court's decision is inconsistent with the congressional intent of the 1972 LHWCA Amendments as set forth in the legislative history. The committee report to which petitioners refer, which pre-dated the *Scindia* and *Howlett* decisions, states that where a longshoreman slips on oil on a ship's deck, in order to recover he must establish that the shipowner put the oil on the deck or knew it was there and negligently failed to remove it, or establish that the oil had been on the deck for a sufficient period of time for the shipowner to have discovered and removed the oil. H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 10-11, reprinted in 1972 U.S.C.C.A.N. 4698, 4704.

The decision of the District Court and the Eleventh Circuit affirmance are not in conflict with the expressed congressional intent. In this case there is no contention that the shipowner "put" the oil on the deck in the sense of an intentional act or that the shipowner knew that it was there at anytime prior to the accident. Petitioners simply allege that the oil came from a crane house on the ship. They do not contend that the shipowner had prior knowledge of the oil on the deck. Although petitioners claim that vessel crewmembers had been seen on deck prior to the accident, mere presence of a vessel's crew on the ship does not prove knowledge of a hazardous condition. *Casaceli v. Martech International, Inc.*, 774 F.2d 1322, 1330 (5th Cir. 1985), cert. denied 475 U.S. 1108-09 (1986). Because there is no evidence as to when the

oil spilled onto the deck or how long it had been there prior to the accident, there is no basis upon which the shipowner can be charged with constructive knowledge of the presence of the oil.

Throughout their brief petitioners describe the oil as "undetectable". If the hazard was undetectable to an experienced stevedore superintendent and a stevedore safety director, it was equally undetectable to the ship's crew in the exercise of "ordinary care under the circumstances". *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78, 87 (1994) quoting from *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 416 n.18 (1969).

Merely because the oil allegedly came from the ship's crane housing is not sufficient to raise a factual issue as to satisfaction of the shipowner's turnover duty. If a shipowner could be held liable solely because a hazard allegedly involved vessel equipment, such a rule would lead to a shipowner's liability without fault which has been expressly abolished by Congress.

IV. WHERE IT IS UNDISPUTED THAT OIL ON A SHIP'S DECK IS ROUTINELY ENCOUNTERED AND REASONABLY TO BE EXPECTED BY AN EXPERT STEVEDORE AND AN EXPERIENCED STEVEDORE-SUPERVISOR IS ACTUALLY INSPECTING THE DECK SPECIFICALLY FOR OIL, THEN THE DISTRICT COURT'S HOLDING THAT ON THESE SPECIFIC FACTS THE SHIPOWNER HAD NO DUTY TO WARN THE STEVEDORE OF THE OIL IS CONSISTENT WITH THE *BURNSIDE, SCINDIA,* AND *HOWLETT* CASES.

Under the Supreme Court cases defining a shipowner's turnover duty to warn, *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969), *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78 (1994), a shipowner has no duty

to warn of a hazard which would be anticipated by an experienced stevedore in the ordinary course of cargo operations. The language from *Burnside* is that the shipowner has a duty to warn of "any latent or hidden danger which has not been remedied and is *not usually encountered or reasonably to be expected by an expert and experienced stevedoring company* in the performance of the stevedoring work aboard the ship". *Federal Marine Terminals,* 394 U.S. at 417 n.18, quoting from *Hugev v. Dampskisaktieselskabet International,* 170 F.Supp. 601, 611, aff'd *sub nom Metropolitan Stevedore Co. v. Dampskisaktieselskabet International,* 274 F.2d 875, cert. denied, 363 U.S. 803 (1960) (emphasis supplied). If the stevedore expects or anticipates the hazard, there is no duty to warn of it.

As previously discussed, the petitioner stevedore superintendent admits in his pleadings that an experienced stevedore would anticipate oil on the weather deck of a cargo ship and that he was inspecting the deck specifically for oil at the time of the accident. In light of these admissions, the lower court's holding that the shipowner had no duty to warn the superintendent of a hazard he anticipated and was looking for is consistent with Supreme Court authority.

Although the oil hazard in this case was allegedly obscured, it is illogical for petitioners to admit that oil on the deck is so common that an experienced stevedore would anticipate its presence and at the same time contend that an experienced stevedore would not anticipate that some patches of oil on the deck are easier to see than others. Moreover the oil in this case was not "latent" as defined in the *Burnside* and *Howlett* cases. Under these authorities, a latent defect is one not usually encountered or reasonably to be expected by an experienced stevedore. *Federal Marine Terminals,* 394 U.S. at 417 n.18; *Howlett v. Birkdale Shipping Co.,* 512 U.S. at ——, 129 L.Ed.2d

at 88, 92. Since it is undisputed in this case that oil on the weather deck is routinely encountered and is to be anticipated by an experienced stevedore, the oil hazard was not latent as defined in *Burnside* and *Howlett* and the District Court decision is consistent with Supreme Court authority. Moreover petitioners make no contention that obscured oil on the deck of a cargo ship is anything unusual or would not be anticipated by an experienced stevedore. Because petitioners cannot make a showing that the shipowner had a duty to warn, an essential element of their case, summary judgment on this issue was mandated. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

Although petitioners contend that the District Court decision conflicts with two Fifth Circuit cases, *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161 (5th Cir. 1990) and *Gay v. Barge 266*, 915 F.2d 1007 (5th Cir. 1990), these opinions have no application to the uncontested facts in the case before this court. The two cited cases involve hazards which the maritime workers had no practical choice but to encounter in order to do their work. The basis for the rulings is that where the hazard is unavoidable such that the worker has no practical alternative to subjecting himself to the hazard notwithstanding its obviousness or the fact that the danger is anticipated by him, the shipowner has potential liability. This rule was recognized in *Kirsch v. Plovidba*, 971 F.2d 1026 (3d Cir. 1992), another case cited by petitioners, where the Third Circuit upheld a summary judgment for the defendant shipowner on the basis that the vessel owner is liable for injury caused by an obvious hazard only if the longshoreman worker could not avoid the hazard and work safely.

In contrast to the situation in the *Treadaway* and *Gay* cases, there is no evidence or even a contention that the petitioner stevedore superintendent had no practical alternative but to step in the oil or that the oil was otherwise unavoidable. Based on the area as shown in the photo-

graphs in petitioners' brief, it would have been a simple matter for the superintendent to have stepped around the oil had he been attentive. Therefore the cited decisions have no application to the admitted facts of this case.

Petitioners also contend that the District Court decision conflicts with the Ninth Circuit's opinion in *Thomas v. Newton International Enterprises*, 42 F.3d 1266 (9th Cir. 1994). In *Thomas* the court held that the opinion of an expert, which was excluded by the trial court, raised a material issue of fact as to whether the presence of an unguarded hatch opening on a vessel represented an unreasonably dangerous condition. Petitioners have offered no such opinion in this case. The Ninth Circuit held that although the plaintiff could have avoided falling into the open hatch cover by stepping in a different direction, this did not relieve the shipowner of liability where the hazard was *not* one that an experienced longshore worker, mindful of the dangers he should reasonably expect to encounter, would anticipate. *Thomas*, 42 F.3d at 1272. In contrast, it is undisputed in the present case that an experienced stevedore would anticipate finding oil on the deck and that petitioner superintendent was inspecting the deck specifically for oil at the time of the accident.

CONCLUSION

The District Court decision and the Eleventh Circuit affirmance do not depart from *Burnside*, *Scindia*, or *Howlett* in any respect. Presented with a factual situation where a stevedore-supervisor anticipated and was inspecting specifically for the very hazard he claims caused his injury, the District Court and the Eleventh Circuit looked to *Scindia's* guidance concerning a shipowner's nonliability for hazards anticipated by the stevedore and applied it to petitioners. This ruling is consistent with the holding of *Scindia* on that subject and does not provide a basis under Supreme Court Rule 10 for granting a

writ of certiorari. It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. CV493-36

JAMES T. WILSON and ELAINE WILSON,
Plaintiffs,

vs.

ALEXANDER'S POWER SHIPPING CO., LTD.,
Defendant.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE ISSUE TO BE TRIED

NOW COMES the defendant Alexander's Power Shipping Co., Ltd. and submits the following statement of material facts in support of its motion for summary judgment:

1) On April 17, 1991 the Motor Vessel ALEXANDER'S POWER was calling at Savannah for the purpose of loading lumber. Allsouth Stevedoring Company of Savannah, an independent stevedoring contractor, was in charge of the loading operation. (Complaint, paragraph 6; affidavit of Jon W. Latiolais, paragraph 3)

2) Plaintiff James T. Wilson was at all pertinent times an experienced stevedore superintendent for Allsouth Stevedoring Company (Complaint, paragraph 63 and was supervisor of Allsouth's loading operation.

3) At the time of the alleged accident, plaintiff was on the ship's weather deck proceeding toward the number 2 hold. (Complaint, paragraph 7).

4) Plaintiff contends that he slipped on an oil slick located on the weather deck and fell on his back, sustaining injury. (Complaint, paragraph 7)

5) Plaintiff's accident occurred at approximately 7:50 a.m. and it was broad daylight at the time.

6) The oil slick on which plaintiff contends he slipped was out in the open on the weather deck and there was nothing obstructing it from view. (affidavit of Jon W. Latiolais, paragraph 6).

7) The oil slick covered an area on the deck approximately two feet wide and two feet long. (affidavit of Jon W. Latiolais, paragraph 5)

8) There was sufficient space on the deck around the oil slick so that someone walking on the deck could avoid stepping in the oil. (affidavit of Jon W. Latiolais, paragraph 8)

9) The oil was shiny and distinct in appearance from the deck area underlying and surrounding it. (affidavit of Jon W. Latiolais, paragraph 6)

10) The color of the oil was reddish brown. (affidavit of Jon W. Latiolais, paragraph 6)

11) Oil and grease are common safety hazards found on the weather deck of a merchant vessel. (affidavit of Robert C. Stone, paragraphs 4 and 6; affidavit of Harry E. Jennings, paragraph 2)

12) Sources of oil and grease found on the weather deck of a merchant vessel include the ship's cranes and winches, mechanical hatch covers, cargo wires and cables, hydraulic lines, deck cargo consisting of motorized vehicles and equipment, and drum cargo. (affidavit of Robert C. Stone, paragraph 4; affidavit of Harry E. Jennings, paragraph 3)

13) An experienced stevedore superintendent reasonably competent in the performance of his work should

watch for safety hazards on the weather deck of a merchant vessel which could present a danger to the stevedore's longshoremen employees in the performance of their work on the vessel. (affidavit of Robert C. Stone, paragraph 3; affidavit of Harry E. Jennings, paragraph 4)

14) An experienced stevedore superintendent reasonably competent in his work should anticipate, watch for, and avoid oil and grease on the weather deck of a merchant vessel. (affidavit of Robert C. Stone, paragraphs 4 and 6; affidavit of Harry E. Jennings, paragraph 4)

15) One of the responsibilities of a stevedore is to comply with the Federal Safety and Health Regulations for the Longshoring Industry. (29 C.F.R. § 1918 *et. seq.*)

16) Section 1918.91 (c) of the Federal Safety and Health Regulations for Longshoring requires a stevedoring company to eliminate slippery conditions as they occur.

17) Section 1918.38 of the Federal Safety and Health Regulations for Longshoring provides that in instances where a ship's deck is wet with oil, the stevedore employer shall not permit longshoring employees to work until necessary walking and working areas have been made safe by suitable non-skid materials.

18) In order to comply with the regulations referred to in paragraphs 16 and 17 hereof, hte stevedore normally inspects the ship's weather deck for oil and grease which could present a hazard to the longshoremen employees in their work and makes sure that slippery conditions are eliminated before the longshoremen start work on the ship. (affidavit of Robert C. Stone, paragraph 5)

19) In order to comply with the regulations referred to in paragraphs 16 and 17 hereof, an experienced stevedore reasonably competent in his work must anticipate and watch specifically for the presence of oil and grease on the weather deck of a merchant vessel. (affidavit of Robert C. Stone, paragraph 5)

This 29th day of April, 1993.

CHAMLEE, DUBUS & SIPPLE

By: /s/ David F. Sipple
DAVID F. SIPPLE
Georgia State Bar
Number 649200

P.O. Box 9523
Savannah, Georgia 31412
(912) 232-3311

Attorneys for Defendant
Alexander's Power Shipping
Co., Ltd.

CERTIFICATE OF SERVICE

This is to certify that a copy of the forgoing pleading was served on counsel of record by placing a copy of same in the United States Mail with adequate postage and addressed as follows:

Edwin D. Robb, Jr., Esquire
Bouhan, Williams & Levy
P.O. Box 2139
Savannah, Georgia 31498-1001

This 29th day of April, 1993.

/s/ David F. Sipple
DAVID F. SIPPLE
Of Counsel for Defendant
Alexander's Power Shipping
Co., Ltd.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. CV 493-36

JAMES T. WILSON and ELAINE WILSON,
Plaintiffs,

vs.

ALEXANDER'S POWER SHIPPING CO., LTD.,
Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE ISSUE TO BE TRIED

COMES NOW the Plaintiffs in the above-captioned matter and respond to the Defendant's Statement of Material Facts as to Which There Exists No Genuine Issue to be Tried as follows:

1. The Plaintiffs admit paragraph one but aver that at the time of the incident loading operation had not commenced.

2. The Plaintiffs admit paragraph two but aver that at the time the incident occurred the loading operation had not commenced.

3. The Plaintiffs admit paragraph three.

4. The Plaintiffs admit paragraph four.

5. The Plaintiffs admit paragraph five.

6. The Plaintiffs deny paragraph six.

7. The Plaintiffs deny paragraph seven. As set forth in Donald Klages' affidavit, he could not detect the pres-

ence of any oil until after Plaintiff fell. He detected oil only by rubbing his hand across the area where Plaintiff fell. He can state that, after oil was detected, it seemed to run in a stream from the house and its dimensions were not 2 ft. x 2 ft. Prior to the Plaintiff's fall, neither Plaintiff, Mr. Hughes and/or Mr. Klages detected any oil.

8. The Plaintiffs deny paragraph eight.

9. The Plaintiffs deny paragraph nine.

10. The Plaintiffs deny paragraph ten.

11. The Plaintiffs admit paragraph eleven but aver that the oil was transparent, mingled with the dew on the deck and therefore constituted a hidden hazard.

12. The Plaintiffs admit paragraph twelve but avers that the oil constituted a hidden hazard that was not detected by two Allsouth stevedores and the Allsouth Safety Director.

13. The Plaintiffs admit that Plaintiff and his co-stevedore Mr. Hughes were looking for oil as well as Allsouth's Safety Director. Neither one detected the presence of the transparent oil.

14. The Plaintiffs admit that a stevedore superintendent should watch out for oil but aver that the oil in question constituted a hidden hazard. Moreover, even had it not been a hidden hazard, it would have been difficult to avoid under the circumstances in which Plaintiff was required to walk on previously stowed lumber down to the deck in order to proceed on the starboard weather deck.

15. The Plaintiffs admit paragraph fifteen but deny that Plaintiff violated any of these regulations.

16. The Plaintiffs admit paragraph sixteen but deny the relevancy to the incident occurring prior to turnover.

17. The Plaintiffs admit paragraph seventeen but questions whether this section is relevant prior to turnover.

18. The Plaintiffs admit paragraph eighteen but deny that this oil could have been detected and that it constituted a hidden hazard. Moreover, even if it had not constituted a hidden hazard, under the circumstances it would not have been easily detected.

19. The Plaintiffs admit paragraph nineteen but aver that Plaintiff and his co-workers looked for presence of oil but could not detect it in view of the fact that it constituted a hidden hazard. Moreover, because he was required to walk on lumber and step down onto the deck in order to proceed on the weather deck even an open condition would have been difficult to detect and, thus, difficult to avoid under the circumstances.

This the 24th day of May, 1993.

BOUHAN, WILLIAMS & LEVY

By: /s/ Edwin D. Robb, Jr.
EDWIN D. ROBB, JR.
Georgia State Bar # 33490
Attorney for Plaintiffs

Post Office Box 2139
Savannah, GA 31498-1001
(912) 236-2491

CERTIFICATE OF SERVICE

I Edwin D. Robb, Jr., do hereby certify that I have this day served the foregoing Plaintiff's Response to Defendant's Statement of Material Facts as to Which There Exists No Genuine Issue to be Tried by placing a copy of the same in the United States mail, with proper postage affixed to assure delivery, to counsel of record as follows:

David Sipple, Esq.
Chamlee, Dubus & Sipple
P.O. Box 9523
Savannah, Georgia 31412

This the 24th day of May, 1993.

BOUHAN, WILLIAMS & LEVY

By: /s/ Edwin D. Robb, Jr.
EDWIN D. ROBB, JR.
Georgia State Bar # 33490
Attorney for Plaintiffs

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